payments under "subsection (b)" to the independently authorized, retroactive "transition payments" provided for at "subsection (h)." The statute's payment limitation is found at subsection (d)(2) of 7 U.S.C. § 7982, and that subsection expressly restricts that limitation to payments "under subsection (b)."

Subsection (b) explicitly pertains only to the prospective monthly payments that a dairy producer receives for the months following that producer's entry into a contract. *See* (b) (Secretary must offer to enter into contracts); (d) (payment quantity applicable to a month based on quantity produced during the month); (e) (payments must be made "monthly," not later than 60 days after the last day of a month for which payment is due); and (g) (except for terminations and for "subsection (h)," "contracts" entered into cover production during the period starting with the first day of the month the producers enter into contracts and ending September 30, 2005).

But the "transition payments" are not "subsection (b)'s" monthly contract payments, but are the independently authorized "subsection (h)" payments. These "subsection (h)" payments are expressly stated to be "in addition to any payment that is otherwise available under this section."

The Secretary by the regulation has thus erroneously added words to and disregarded words of the statute to make the payment limitation apply to the retroactive "transition payments" as well, when that was obviously not Congress' clear direction in the law. The Secretary has thus disregarded and distorted Congress' clearly and plainly stated intent.

The critical importance of focusing on the precise use of legislative drafting terms, such as a specific "subsection" reference, in discerning Congress' intent to its legislation, has recently been highlighted by this Court in *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. ___, 125 S.Ct. 460, 160 L.Ed.2d 389 (2004). There, this Court was concerned with a drafting mistake, in the context of certain clauses in a subparagraph of a paragraph of a subsection of the Truth In Lending Act, which mistake became obvious by considering prior amendments to that subparagraph and clauses.

This Court, in *Koons*, construed the statute in a way consistent with those prior amendments. In its opinion, this Court relied on the Senate and House legislative drafting manuals and the hierarchical scheme to which Congress adheres in subdividing statutory sections and, in so doing, stressed the importance of recognizing the precision with which statutes are drafted. This importance is also reflected in Justice Scalia's dissent, in which he writes: "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result." 125 S.Ct. at 476, (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004) (internal quotation marks and alteration omitted)). *See also United States v. Great Northern*, 343 U.S. 562, 575 (1952) ("It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written.").

In the case at bar, there is no mention by the lower appellate court of any drafting error. Yet the statute's reference to "subsection (b)" is a critical term. And the

statute's clear and precise direction to apply the 2.4 million pound payment limitation only to "subsection (b)" payments must control. This Court's decision in *Koons* establishes precedent that, we submit, requires reversal of the court below. This fact alone reflects the importance of this case and constitutes sufficient basis to grant the writ of certiorari.

While the Secretary may pretend to "fill in the gaps" by applying the prospective "cap" limitation also to "subsection (h)" retroactive transition payments, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

In *Lamie*, this Court applied the "plain language" rule of statutory construction to a question involving a bankruptcy statute and whether compensation was allowed to debtors' attorneys. This Court held that a plain, straightforward reading of the bankruptcy statute in question did not allow compensation to debtors' attorneys unless those attorneys were employed by the trustee with court approval. This Court stated: "We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *Id.* at 536.

In the case at bar, the Secretary may not "fill in the gaps" by applying the payment limitation to "subsection (h)" transition payments, for, to do so, amounts to rewriting the rules that Congress has affirmatively and specifically enacted. The Secretary not only re-defines Congress'

definition of "eligible production" but also adds the language "and subsection (h)" to paragraph (2) of subsection (d). The Secretary must be made to understand that, in the view of this Court: "Congress 'says in a statute what it means and means in a statute what is says there'." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). In *Hartford Underwriters Ins. Co., supra*, this Court applied a "plain language" construction to a bankruptcy statute and observed, with regard to competing policy arguments: "[W]e do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that a natural reading of the text produces the result we announce. Achieving a better policy outcome – if what petitioner urges is that – is a task for Congress, not the courts." *Id.* at 13-14.

The Secretary evidently believes that a better policy approach is to apply the prospective "cap" to the retroactive "transition payments" as well. Deciding if that is or is not the case, however, is a task for Congress, not the Secretary, and it is exactly the opposite of what Congress' words plainly direct in the current statutory scheme.

The license the Secretary has taken to embellish and, we submit, distort this statute – in all respects a straightforward, plain-meaning statute that plainly restricts the payment limitation provision to "subsection (b)," pertaining to the monthly contracts – suggests that the Secretary believes that Congress meant to apply the prospective cap limitation to the retroactive transition payments. However, again, the Secretary is not permitted, any more than a court is permitted, to re-write the statute. "But, again, our inquiry focuses on an analysis of the textual product of

Congress' efforts, not on speculation as to the internal thought processes of its Members," *Carter v. U.S.*, 530 U.S. 255, 272 (2000), also observing: "[W]e begin by examining the text [of a statute] [citation omitted] not by 'psychoanalyzing those who enacted it'." (Quoting *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 279 (1966)). *Id.* at 271.

The Secretary is given no enlarged authority to embellish a statute under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). A case, such as this, that involves an administrative agency's construction of a statute that it administers, requires an analysis under *Chevron*. This Court, in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), explained the analysis required by *Chevron*, in reaching its decision that the Food, Drug and Cosmetic Act clearly forbad regulatory authority in the Food and Drug Administration ("FDA") with respect to its purported regulation of tobacco products. This Court explained:

> Under *Chevron*, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843, 104 S.Ct. 2778; [Citations omitted.] But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible.

Brown & Williamson Tobacco Corp. at 132. This Court further explained: "Deference under Chevron to an agency's construction of a statute that it administers is

premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Id.* at 159.

In the case at bar, Congress "has directly spoken to the precise question at issue." That question is: "To what extent are national dairy market loss payments under 7 U.S.C. § 7982 subject to a "cap" under 7 U.S.C. § 7982?" The statute answers that precise question: Those "payments under subsection (b)." Those payments pertain to the monthly contract payments. There is no ambiguity; there are no statutory gaps; and there is no implicit Congressional delegation to the Secretary to fill gaps by extending that prospective "cap" to the retroactive "transition payments" provided for in subsection (h).

In *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218 (1994), this Court ruled against the Federal Communications Commission, holding that its rule, exempting nondominant long distance telephone carriers from tariff filing, constituted a fundamental change in the regulatory scheme, which was beyond the Commission's statutory authority to "modify" requirements under the Communications Act. Drawing, in large part, on dictionary definitions, this Court held that the Commission's rule went clearly beyond the Commission's statutory authority to "modify." This Court accorded the rule no deference, "[s]ince an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear . . . " *Id.* at 229. The Commission's rule, explained the Court, "is a fundamental revision of the statute. . . . That may be a good idea, but it was not the idea Congress enacted into law in 1934." *Id.* at 232.

Similarly, in the case at bar, the Secretary lacks statutory authority "to modify" this national dairy market loss payment program. Whether the Secretary's "idea" that "transition payments" should be capped is or is not a good idea is immaterial. The fact is that it is "not the idea Congress enacted into law."

The term "subsection (b)" occupies a pivotal place in the scheme of the statute and should not be disregarded. See *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are . . . "reluctan[t] to treat statutory terms as surplusage" in any setting. [Citations omitted]. We are especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme. . . . "). See also *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003) ("Absent a statutory text or structure that requires us to depart from normal rules of construction, we should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous"); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (declining to adopt a construction that would violate the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect").

The Secretary, we submit, has engaged in policy-making not intended by Congress, to the disadvantage of producers of all sizes, who have been or might be made erroneously subject to a cap on their transition payments.

CONCLUSION

Amicus Curiae State of New Mexico respectfully submits that the case at bar is extremely important to the preservation of Congress' power to enact and enforce its

laws and its policies as established by Congress. *Amicus Curiae* State of New Mexico respectfully prays that the Petition for Writ of Certiorari be granted; that the lower court be reversed; that the Secretary's regulations that are challenged here be declared invalid; and that the Court grant such further relief as the Court deems just and proper.

Dated: July 12, 2005

Respectfully submitted,

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(5)

No. 04-1361

In the Supreme Court of the United States

MICHAEL FULLENKAMP, ET AL.,
PETITIONERS

v.

MIKE JOHANNS, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Secretary of Agriculture's construction of a statutory cap on the amount of milk production that may qualify for federal assistance under the Milk Income Loss Contract Program, 7 U.S.C. 7982 (Supp. II 2002).

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In the Supreme Court of the United States

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MIKE JOHANNS, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 383 F.3d 478. The memorandum and order of the district court (Pet. App. 15a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2004. A petition for rehearing was denied on January 6, 2005 (Pet. App. 40a). The petition for a writ of certiorari was filed on April 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Milk Income Loss Contract Program, 7 U.S.C. 7982,[1] establishes an income support program authorizing monthly federal payments to dairy farmers. In order to be eligible for payments under the program, a dairy farm producer must enter into a contract with the Secretary of Agriculture. 7 U.S.C. 7982(b). Once the contract is in place, a farmer is eligible for prospective monthly payments on qualifying production marketed during the period running from the first day of the month in which the contract is signed to September 30, 2005. 7 U.S.C. 7982(g)(1). Contracting farmers are also eligible for a single, retrospective, "transition" payment for qualifying production marketed during the period from December 1, 2001, to the last day of the month preceding the month in which the contract is signed. 7 U.S.C. 7982(h).

The criteria by which the amount of assistance payments is determined are set forth in three provisions of the statute: (1) 7 U.S.C. 7982(c), which sets out the general formula by which the Secretary determines the amount of assistance payments to be dispensed under the program; (2) 7 U.S.C. 7982(d), which, in defining the "payment quantity" used in Section 7982(c)'s statutory formula, specifies the amount of production that qualifies for federal assistance; and (3) 7 U.S.C. 7982(h), which provides that the formula used to determine the amount of a transition payment is the formula contained in Section 7982(c).

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[1] All references to 7 U.S.C. 7982 are to the Supplement II (2002) to Title 7 of the United States Code.

These provisions state as follows:

(c) Amount

Payments to a producer under this section shall be calculated by multiplying (as determined by the Secretary)—

(1) the payment quantity for the producer during the applicable month established under subsection (d) of this section;

(2) the amount equal to—

(A) $16.94 per hundredweight; less

(B) the Class I milk price per hundredweight in Boston under the applicable Federal milk marketing order; by

(3) 45 percent.

(d) Payment quantity

(1) In general

Subject to paragraph (2), the payment quantity for a producer during the applicable month under this section shall be equal to the quantity of eligible production marketed by the producer during the month.

(2) Limitation

The payment quantity for all producers on a single dairy operation during the months of the applicable fiscal year for which the producers receive payments under subsection (b) of this section shall not exceed 2,400,000 pounds. For purposes of determining whether producers are producers on separate dairy operations or a single dairy operation, the Secretary shall apply the

same standards as were applied in implementing the dairy program under section 805 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 (as enacted into law by Public Law 106-387; 114 Stat. 1549A-50).

* * * * *

(h) Transition rule

In addition to any payment that is otherwise available under this section, if the producers on a dairy farm enter into a contract under this section, the Secretary shall make a payment in accordance with the formula specified in subsection (c) of this section on the quantity of eligible production of the producer marketed during the period beginning on December 1, 2001, and ending on the last day of the month preceding the month the producers on the dairy farm entered into the contract.

* * * * *

7 U.S.C. 7982.

2. The Secretary promulgated regulations implementing these provisions on October 18, 2002. See 67 Fed. Reg. 64,454. The regulations provide, *inter alia*, that a transition payment is subject to the same 2.4 million-pound annual statutory cap on eligible production that applies to monthly payments. See 7 C.F.R. 1430.206(b)(1), 1430.207(b); see also 7 C.F.R. 1430.208(d) ("Payments under this subpart may be made to a dairy operation only up to the first 2.4 million pounds of eligible milk production per applicable fiscal year, including any year in the transition period."). The Secretary ad-

vanced several reasons for adopting this construction of the statute. First, the conference committee report accompanying the legislation expressly referred to the production cap without any distinction between monthly and transition payments. 67 Fed. Reg. at 64,456. Second, previous similar dairy price support legislation incorporated production caps limiting all production without distinction. *Ibid.* Third, and most important, a contrary interpretation would vitiate the statutory cap by permitting producers to delay entering into a contract until immediately before the end of the program, at which point they could seek an uncapped transition payment for all production that would have otherwise been subject to limitation under the monthly payment program. *Ibid.* The Secretary accordingly concluded that "the cap covers all fiscal years, including the fiscal year in which the transition period falls." *Ibid.*

3. Petitioners filed this action in the United States District Court for the Northern District of Ohio, seeking, *inter alia*, a declaratory judgment that dairy producers who are entitled to payments during the transition period are entitled to a lump-sum payment for all the milk produced and marketed during the transition period, without a cap. Petitioners also requested an injunction compelling the Secretary to modify the regulations to allow uncapped transition payments.

The district court rejected petitioners' challenge (Pet. App. 15a-39a) and upheld the regulations, applying the two-step analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Barnhart* v. *Walton*, 535 U.S. 212 (2002). The court first reasoned that Section 7982 does not unambiguously forbid the Secretary's interpretation, be-

cause Section 7982(d)(2) can be construed to cap all payments to producers, and because Section 7982(h), which authorizes the transition payments, subjects those payments to the formula set forth in Section 7982(c), which in turn incorporates the Section 7982(d) cap. Pet. App. 29a-31a. Having concluded that the statute is ambiguous, the court proceeded to step two of the *Chevron* analysis, pursuant to which a reviewing court must defer to an agency's interpretation of a statute it is charged with administering if the interpretation is reasonable. *Chevron*, 467 U.S. at 843. The court concluded that the Secretary's interpretation of the statute here is reasonable and therefore upheld the regulations. Pet. App. 31a-34a.

4. The court of appeals affirmed. Pet. App. 1a-14a. Likewise engaging in the two-step *Chevron* analysis, the court first considered the text of Section 7982 and concluded that it did not clearly indicate whether the phrase "payments under subsection (b)," which are subject to the production cap, see 7 U.S.C. 7982(d)(2), includes transition payments as well as prospective payments. Pet. App. 9a. The court further determined that "[n]either the legislative history of the statute nor the parties' explanations of how their interpretations further the purpose of the statute sufficiently clarify the ambiguity in the statutory language." *Id.* at 10a.

The court then proceeded to step two of *Chevron*, under which it must uphold the Secretary's interpretation so long as it is reasonable. Pet. App. 13a. On that point, the court held that the Secretary's interpretation is "eminently reasonable" because the statutory cap on qualifying production could easily be construed to apply to any payment authorized by the dairy farmer's con-